FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-504

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FLEET FACTORS CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS, THE CALIFORNIA LEAGUE OF SAVINGS INSTITUTIONS, GLENDALE FEDERAL BANK, F.S.B., HOMEFED BANK, F.S.B., AND IMPERIAL BANK AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a secured lender is liable under CERCLA for environmental response costs incurred at the borrower's facility, despite the statutory exemption for secured lenders, where the lender neither took legal title to the borrower's property nor participated in the day-to-day management of the facility.

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This *amici curiae* brief is filed on behalf of the National Council of Savings Institutions, the California League of Savings Institutions, Glendale Federal Bank, F.S.B., HomeFed Bank, F.S.B., and Imperial Bank with the written consent of all parties to this action.[1] *Amici* urge the Court to grant certiorari in this case.

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[1] *See* Sup. Ct. R. 37.2. Statements of consent are on file with the Clerk of the Court.

STATEMENT OF INTEREST

The National Council of Savings Institutions (the "National Council") is a major trade association headquartered in Washington, D.C. It represents approximately 400 savings banks and savings and loan associations nationwide.

The California League of Savings Institutions (the "California League") is another major trade association. It represents all savings institutions in the State of California.

Glendale Federal Bank, F.S.B. is the nation's fourth largest savings institution. It provides real estate lending and consumer banking services at 235 branch offices in California, Florida, and Washington, and has in excess of $24 billion in assets.

HomeFed Bank, F.S.B. is a federal savings bank with consolidated assets of approximately $19 billion. The bank operates a network of 212 retail banking offices throughout California. Although its primary lending focus is in California, it has lent money throughout the United States in numerous commercial and residential projects.

Imperial Bank is a state, non-member, Federal Deposit Insurance Corporation ("FDIC") insured commercial bank with assets of approximately $3 billion. It is California's tenth largest commercial bank with twelve banking offices throughout the state. Imperial Bank provides real estate construction and permanent loans to commercial as well as residential borrowers.

The members of the National Council and the California League, as well as Glendale Federal Bank, HomeFed Bank, and Imperial Bank, are substantially involved in secured lending. The issue of the proper scope of secured lender liability for hazardous waste cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*

("CERCLA"), is therefore of great significance to the *Amici*.

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question under CERCLA: whether a secured lender may be held liable for cleanup costs at a borrower's facility, even though the lender did not participate in the day-to-day management of the site and is thus not an "operator" of the facility. Contrary to every other court to address the issue, the Eleventh Circuit held that a secured lender need not have participated in such day-to-day management to be held liable. Rather, it must simply have had the "capacity to influence" the borrower's management of hazardous waste at the site. Pet. App. 14a. If allowed to stand, the Eleventh Circuit's decision will have severe economic consequences for banks and savings institutions. Such institutions will find themselves confronted with enormous and unanticipated hazardous waste cleanup costs in situations in which they never foreclosed on their security interest and never exercised control. The ultimate consequence will be that these institutions will be reluctant to make loans to companies that may have environmental problems. This Court's review is plainly warranted.

I. THE ELEVENTH CIRCUIT'S DECISION MISREADS THE SECURED CREDITOR EXEMPTION AND CONFLICTS WITH EVERY OTHER CASE TO CONSIDER THE ISSUE

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), identifies the classes of persons who are liable for hazardous waste cleanup costs. These include, *inter alia*, the present "owner" or "operator" of the site and the owner or operator of the site at the time of disposal of hazardous substances. 42 U.S.C. § 9607(a)(1) and (2). CERCLA explicitly defines "owner or operator" to

exempt "a person, who, *without participating in the management of a . . . facility*, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C. § 9601(20)(A) (emphasis added).

In construing the "secured creditor" exemption, the district court below concluded that secured lenders may "provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business . . . ." Pet. App. 28a.

The Eleventh Circuit rejected the district court's standard, concluding that it was "too permissive towards secured creditors who are involved with toxic waste facilities." Pet. App. 13a. Under the standard adopted by the Eleventh Circuit, a lender may be liable for the borrower's CERCLA liabilities "by participating in the financial management of a facility to a degree indicating a *capacity* to influence the corporation's treatment of hazardous wastes." *Id.* at 13a-14a (emphasis added). Stated another way, under the Eleventh Circuit's standard, "a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it *could affect* hazardous waste disposal decisions if it so chose." *Id.* at 14a (emphasis added). The court of appeals specifically stated that "[i]t is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable. . . ." *Id.*

The Eleventh Circuit's standard renders CERCLA's secured creditor exemption virtually meaningless. Even if the lender refrains from foreclosing on the borrower's property, and carefully avoids any participation in the operation of the borrower's facility, it may be liable to the United States or private parties for CERCLA cleanup costs merely because it holds a mortgage, lien, or other security interest and exercises—or has the power to

exercise—prudent collateral management in the nature of financial oversight solely to protect that interest. In essence, this means that a lender risks exposure to CERCLA liability virtually any time it makes a secured loan to the owner of a facility where a hazardous substance has been deposited, stored, disposed of, or placed, even where neither the lender nor the borrower was aware of any environmental problem at the time of the loan.

In interpreting the secured creditor exemption, the Eleventh Circuit has seriously misconstrued the language and purposes of Section 101(20)(A). That section, by its terms, was clearly designed to avoid the imposition of either "owner" or "operator" liability on lending institutions that did not engage in "management" of the facility and that acted "primarily to protect [their] security interest in the facility."

Prior to the Eleventh Circuit's decision, every court to address the question had held that day-to-day operational involvement at a borrower's facility was a prerequisite for subjecting a non-foreclosing secured lender to CERCLA liability. The first detailed analysis of the issue was in *United States v. Mirabile*, 15 Envtl. L. Rep. 20994 (E.D. Pa. 1985). The court in *Mirabile* held that, to be liable under the exemption, a secured creditor must participate in the "operational, production, or waste disposal activities" of the corporation. *Id.* at 20995. "Mere financial ability to control waste disposal practices . . . is not sufficient . . . ." *Id.* Put another way, "it must, at a minimum, participate in the day-to-day operational aspects of the site." *Id.* at 20996. Several other cases, including the district court decision below (*see* Pet. App. 28a), have adopted the same approach. *See, e.g., In re T.P. Long Chemical Inc.*, 45 Bankr. 278, 289 (Bankr. N.D. Ohio 1985) (under the secured creditor exemption, a lender must have "participated in the management of the [borrower's] facility" to be held liable);

Guidice v. BFG Electroplating and Manufacturing Co., 732 F. Supp. 556, 561 (W.D. Pa. 1989) (stating that "a mortgagee is exempt . . . under 42 U.S.C. § 9601(20)(A) so long as [it] did not participate in the managerial and operational aspects of the facility").

Most recently, the Ninth Circuit emphasized the need for operational management in order to hold a secured lender liable. *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990). Although the court declined to adopt a precise standard, it noted that "whatever the precise parameters of 'participation,' there must be *some* actual management of the facility before a secured creditor will fall outside the exception." *Id.* at 672 (emphasis in original). According to the court, "[m]erely having the power to get involved in management, but failing to exercise it, is not enough." *Id.* at 673 n.3. Applying that reasoning, the court rejected the argument that simply having "the right 'to direct that hazardous waste be stored properly'" was sufficient to impose CERCLA liability on a secured lender. *Id.* (quoting appellant's brief). While the court did not repudiate the Eleventh Circuit's formulation, there can be little doubt that the two standards are fundamentally at odds. Indeed, the Environmental Protection Agency ("EPA") has itself recognized that *Bergsoe Metal* conflicts with the Eleventh Circuit's decision and that the latter decision is erroneous. *See Draft EPA Rule on Lender Liability (Text)*, IV Inside EPA's Superfund Report No. 22, at 19, 20, 25 ("EPA Draft Rule") (rejecting Eleventh Circuit's standard and, contrary to its position in the court below, proposing *Bergsoe Metal*'s standard of "actual operational participation by the lender").

Thus, the Eleventh Circuit's decision stands alone, unsupported by any other decision and even by the agency charged with enforcing the statute. Review by this Court is necessary to resolve these conflicting approaches.

II. THE ELEVENTH CIRCUIT'S DECISION, IF NOT OVERTURNED, WILL HAVE A SERIOUS EFFECT ON BANKS, SAVINGS INSTITUTIONS, AND POTENTIAL BORROWERS

Few, if any, issues under CERCLA have received greater attention than the question of lender liability for remediating hazardous waste sites.[2] Indeed, although the Eleventh Circuit's decision was rendered only six months ago, it has already been the subject of considerable commentary, most of it sharply critical of the Eleventh Circuit's analysis.[3] It has also been a focus

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[2] A review of the *Index to Legal Periodicals* reveals that more than 35 law review articles have been written on the topic in the past four years. The following are representative: Marzulla & Kappel, *Lender Liability Under the Comprehensive Environmental Response, Compensation and Liability Act*, 41 S.C.L. Rev. 705 (1990); Dominick & Harmon, *Lender Limbo: The Perils of Environmental Lender Liability*, 41 S.C.L. Rev. 855 (1990); Note, *The Battle Continues: Lenders are Still Searching for Well-Defined Methods to Avoid Hazardous Waste Cleanup Liability*, 19 Stetson L. Rev. 633 (1990); Corash & Behrendt, *Lender Liability Under CERCLA: Search for a Safe Harbor*, 43 Sw. L.J. 863 (1990); Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 Yale L.J. 925 (1989); Note, *Viable Protection Mechanisms for Lenders Against Hazardous Waste Liability*, 18 Hofstra L. Rev. 89 (1989); Note, *Hidden Hazards of Hazardous Waste Cleanup Laws: Lenders and Title Insurers Beware*, 18 Cumb. L. Rev. 723 (1988); Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 Harv. J. on Legis. 317 (1988); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 Wis. L. Rev. 139 (1988); Vollmann, *Double Jeopardy: Lender Liability Under Superfund*, 16 Real Est. L.J. No. 1, at 3 (1987); Burcat, *Environmental Liability of Creditors Under Superfund*, 33 Prac. Law. No. 2, at 13 (1987); Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 Banking L.J. 509 (1986); Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 Bus. Law. 1133 (1986).

[3] *See, e.g.*, Kneipper & Hooks, *Don't Turn Assets Into Liabilities: Ways to Limit Environmental Risks*, 5 Com. Lending Rev. No. 4,

of three separate Congressional hearings and the subject of regulatory review by EPA.[4]

A few statistics illustrate the importance of the issue. EPA estimates that there are more than 30,000 hazardous waste sites around the country.[5] According to EPA, the average cleanup cost per site is about $25 million, with costs for some sites estimated as high as $100 million.[6]

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at 3, 7 (1990) ("[T]he broad legal theory set forth in *Fleet Factors* is very troubling"); Ledbetter, 20 Chem. Waste Litig. Rep. No. 3, at 376 (1990); Parenteau & Johnston, *The Big Chill: The Impact of Fleet Factors on Lenders*, 20 Chem. Waste Litig. Rep. No. 3, at 380 (1990); 2 *The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation* § 14.01[5][c], at 14-75 (S. Cooke ed. 1990); Bolstein & Reznick, *Lender Liability After Fleet Factors*, 10 A.B.A. Envtl. L. No. 3, at 1 (1990).

[4] *See Impact of Superfund Lender Liability on Small Businesses and Their Lenders, Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. (June 7, 1990) ("June 1990 Hearing"); *Hearing on S. 2827: The Federal Deposit Improvements Act of 1990, and Other Environmental Risks to Lenders, Senate Banking Committee*, 101st Cong., 2d Sess. (July 19, 1990) (transcript on file with Senate Banking Committee) ("July 1990 Hearing"); *Hearing on Lender Liability Under Superfund, House Comm. on Energy and Commerce, Subcomm. on Transp. and Hazardous Materials*, 101st Cong., 2d Sess. (Aug. 2, 1990) (draft minutes on file with the House Committee on Energy and Commerce) ("August 1990 Hearing"); EPA Draft Rule, *supra*.

[5] August 1990 Hearing at 3 (statement of Rep. Luken describing EPA estimates). This estimate includes only inactive sites. If active sites, such as industrial and municipal landfills, are included, the estimated number of sites is more than 300,000. General Accounting Office, *Cleaning Up Hazardous Wastes: An Overview of Superfund Reauthorization Issues*, at 10 (1985).

[6] *See* Geltman, *Rule 10b-5 and RICO: Alternative Remedies for Environmental Liabilities Acquired by Stock Purchase of a Closely Held Corporation*, 26 Hous. L. Rev. 455, 457 n.8 (1989) (citing press coverage); *cf.* Sen. Subcomm. on Superfund, Ocean and Water Protection, *Lautenberg-Durenberger Report on Superfund Implementation: Cleaning Up the Nation's Cleanup Program* (1989), at 40 (noting that EPA staff estimates average cleanup costs of

Many of these hazardous waste sites may involve liability on the part of secured lenders. While the vast majority of sites have not yet been the subject of CERCLA enforcement or remediation,[7] lenders (primarily banks and savings institutions) are or have been involved in approximately three dozen CERCLA lawsuits, and EPA has notified approximately 60 additional lenders of potential Superfund liability.[8] These figures can be expected to escalate substantially over time, as EPA continues to investigate hazardous waste sites and to initiate CERCLA enforcement proceedings. Indeed, one witness at recent Congressional hearings on lender liability testified that the cost of cleanup for banks could exceed $100 billion. August 1990 Hearing at 177-78.

Prior to the Eleventh Circuit's decision, no bank or savings institution could have foreseen the serious risk of exposure to hazardous waste cleanup liability that would result from making ordinary business loans and exercising traditional collateral management. Consequently, such institutions now face the prospect of enormous unanticipated CERCLA liability.

In many cases, this liability could vastly exceed the amount the creditor agreed to lend against the security of the property. Indeed, with average cleanup costs estimated at $25 million per site, *see* page 8, *supra*, and with CERCLA providing for joint and several liability, *see, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989), cleanup costs will often exceed the fair market value of the property, even after full remediation. At a time when many banks and savings institutions already face

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1163 sites listed on the National Priorities List at $18 million per site).

[7] *See* August 1990 Hearing at 3 (statement of Rep. Luken) (noting that cleanup has "begun" on about four percent of the hazardous waste sites).

[8] *See Risks to Lenders—EPA Lists Cases Where Lenders Risk Liability*, IV Inside EPA's Superfund Report No. 21, at 25 (1990).

serious financial difficulties, the imposition of massive Superfund liability could have severe consequences. Although the Eleventh Circuit notes that, in the future, creditors, aware of its decision in this case, will weigh the risk of CERCLA liability in making loans, Pet. App. 15a, this provides little comfort to institutions that made loans prior to its decision. It also does not help in the case of a hazardous waste problem, such as buried waste, that does not become known until years after the loan is made.

Yet another problem for creditors who have already made loans arises when the borrower encounters financial difficulty. In the past, a typical creditor would actively assist its borrowers in assessing their finances and working out their financial setbacks. This practice, known as "collateral management," is beneficial both to creditors and borrowers, and is often used with small businesses. Under the Eleventh Circuit's decision, however, the prudent lender would be virtually obligated to follow a "hands-off" approach and avoid helping the borrower. Any degree of involvement in the affairs of the borrower could constitute evidence of a "capacity" to influence hazardous waste decisions, and thus subject the creditor to massive cleanup liability.

The Eleventh Circuit's decision, if not overturned, will have a serious impact not only on creditors who have already made loans but also on the future course of lending activity. As a practical matter, lenders will have little choice but to deny financing if there is any possibility that the prospective borrower's site may be subject to CERCLA liability. No reasonable lender will feel free simply to ignore the decision below, even in jurisdictions other than the Eleventh Circuit, since no one can predict whether other circuits will adopt the same standard. This reduction in lending will harm not only lenders but also potential borrowers, many of which are small companies or farmers that may not be able to survive the downturn

in lending. Indeed, the Eleventh Circuit's decision will have the perverse effect of reducing the availability of funds for companies that need to borrow money to address hazardous waste cleanup problems. It will also result in costs to failed and failing savings institutions, costs that may ultimately be borne by the taxpayers.

The reason the Eleventh Circuit's decision will lead to a decline in lending activity is simple. If financial institutions lend money without taking steps to protect their security investment—such as monitoring the company's financial records—they run a great risk in the event of a default. On the other hand, under the Eleventh Circuit's standard, it is all but impossible for lenders to protect their security interest without incurring CERCLA liability. This is contrary to Congress' purpose in enacting CERCLA, which was primarily to impose cleanup costs on "polluters." *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985). Lenders can be held liable even when they did not cause or contribute to contamination at the borrower's site, and even when they exercised the utmost caution to avoid having any role in the operational management of the site.

The Eleventh Circuit urges lenders "to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard." Pet. App. 16a. Yet, it is precisely that sort of day-to-day involvement in a borrower's operations that, under the language of Section 101(20)(A), *disqualifies* a lender from relying on the exclusion. In other words, the Eleventh Circuit would require a lender to do precisely what would deprive it of the benefit of the secured creditor exemption. The only way to avoid these risks is to refuse to provide loans if there is any question of potential CERCLA liability.

These serious consequences of the Eleventh Circuit's decision are neither speculation nor hypothetical situations. Indeed, even prior to the decision, many lenders

were already concerned about the possibility that a court might construe the exemption narrowly. Five examples from the recent Congressional hearings on lender liability illustrate the point.

First, a witness on behalf of the American Bankers Association testified about the results of a recent poll of banks with assets of $250 million or less. According to the witness, 43 percent of the banks responding to the poll have already stopped making loans altogether to small businesses associated with environmental problems, and an additional 11 percent planned to stop making such loans in the future. July 1990 Hearing at 65-66. Second, a bank officer from Ohio, who appeared on behalf of the Ohio Bankers Association, indicated that his bank had recently amended its loan policy to classify as "undesirable" loans to businesses with high risk environmental implications. August 1990 Hearing at 120. Third, the president of the New York State Bankers Association testified that a bank had to withdraw from a deal involving $50 million of financing because of CERCLA concerns. An environmental audit had been deemed necessary, but since the cost of the audit was $250,000, neither the borrower nor the bank could absorb that cost. June 1990 Hearing at 11. Fourth, a witness testifying on behalf of the National Association of Homebuilders described a situation where, because a chemical company had allegedly dumped hazardous waste on a site, the developer could not obtain financing, even after the developer had shown that in fact there had not been any dumping. August 1990 Hearing at 190. Fifth, representatives of the FDIC stated that the Eleventh Circuit's decision could lead lenders to become less involved in the borrowers' financial affairs, a consequence that would conflict with the FDIC's goal of furthering the soundness of the country's financial system. *Id.* at 89-90.[9] As these

[9] The Eleventh Circuit standard also undermines federal banking requirements applicable to federally regulated depository institutions. Such institutions are required to "meet the credit needs of

examples illustrate, the Eleventh Circuit's decision will have substantial economic effects.

III. REVIEW IS ESSENTIAL AT THIS TIME

While there are only two court of appeals decisions addressing the issue in this case, review at this time is clearly warranted. The issue has already been addressed by several district courts and by numerous commentators, and there is little benefit to be gained by waiting for additional court decisions. Moreover, there is no immediate prospect of legislative or regulatory action. The major bills that Congress has proposed to clarify the lender liability provision were not even reported out of Committee before Congress recessed.[10] While the EPA has written a draft rule on the subject, *see* EPA Draft Rule, *supra*, that draft has been under review by the Office of Management and Budget ("OMB") for months, 21 Env't Rep. (BNA) No. 25, at 1173 (1990), and there is no way to predict when a final regulation will be pro-

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their . . . communities . . . ." Community Reinvestment Act of 1977 ("CRA"), 12 U.S.C. § 2901 *et seq.* *See also* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, at 527.

[10] *See, e.g.*, H.R. 4494, 101st Cong., 2d Sess. (1990) (introduced by Rep. La Falce, referred on April 4, 1990 to House Committee on Energy and Commerce); S. 2827, 101st Cong., 2d Sess. (1990) (introduced by Sen. Garn, referred on June 28, 1990 to Senate Committee on Banking, Housing, and Urban Affairs); S. 2319, 101st Cong., 2d Sess. (1990) (introduced by Sen. Garn, referred on March 23, 1990 to Senate Committee on Environment and Public Works). Indeed, immediately before adjourning, Congress reauthorized the Superfund program without enacting any provision dealing with lender liability. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 3-Year Extension of Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 104 Stat. 1388. For this reason, there is now speculation in the financial community that the possibility of corrective lender liability legislation is "greatly diminished." Wall. St. J., Nov. 5, 1990, at B6, col. 1-2.

mulgated.[11] Finally, even if Congress or EPA takes action in the lender liability area, there is no assurance that the statute or rule that ultimately emerges will address the problems posed by the Eleventh Circuit's decision.

The Eleventh Circuit's decision squarely presents the issue of the proper standard for determining lender liability under CERCLA. Even EPA does not seriously dispute that the standard adopted by that court is erroneous. This Court should grant certiorari and resolve the issue now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] To illustrate the potential for delay, a major hazardous waste cleanup rule under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*, that EPA sent to OMB did not receive OMB approval for 21 months. *See* 21 Env't Rep. (BNA) No. 10, at 427 (1990).